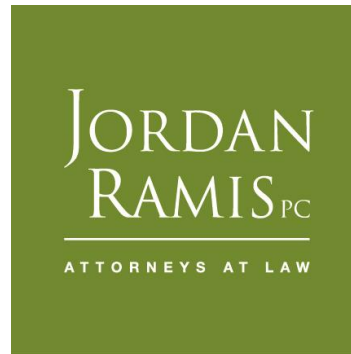


What Can Go Wrong Before and During a Hearing And What to do About it



November 14, 2017

Presented by Peter Watts

Duties of a Commission

- Impartiality and bias issues only apply when an elected or appointed official is a decision maker in a quasi-judicial decision. In order to determine whether they apply, the elected or appointed official must first decide whether the decision they are being asked to make is part of a quasi-judicial proceeding or whether it is legislative.

Duties of a Commission, *cont.*

- There is case law to help make this determination and also guidance in the Milwaukie Municipal Code for Comprehensive Plan Amendments, and zoning Map Amendments.

The Legal Test

- In Oregon, the test to determine whether a proceeding is quasi-judicial is found in the case *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591 (1979).
- To determine the legal nature of a particular ordinance one must balance these three factors:
 1. Is "the process bound to result in a decision?"
 2. Is "the decision bound to apply preexisting criteria to concrete facts?"
 3. Is the action "directed at a closely circumscribed factual situation or a relatively small number of persons?"

There is No Bright Line Rule

- The answer to each question must be weighed and no single answer is determinative. *Estate of Paul Gold v. City of Portland*, 87 Or App 45, rev den 304 Or 405 (1987).
- The more definitely the questions are answered in the negative, the more likely the decision under consideration is legislative in nature. *Miner v. Clatsop County*, 46 OR LUBA 467 (2004).

Strawberry Hill Factor 1

Process Bound to Result in a Decision

- If a City can terminate the process of consideration at any time, then the process is not bound to result in a decision and the first factor is not met. *See Johnson v. City of La Grande*, 37 Or LUBA 380 (1999); *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004);

Strawberry Hill Factor 2

Applying Preexisting Criteria to Concrete Facts

- This second factor is present in most land use decisions, thus, it is less important than the other two factors. Moreover, most LUBA decisions summarily assume that the factor is met and skip the analysis altogether. *See Miner*, 46 OR LUBA 467; *Johnson*, 37 Or LUBA 380; *Valerio*, 33 Or LUBA 604 (1997).

Strawberry Hill Factor 3

Closely Circumscribed Factual Situation/Small Number of Persons

- This factor has been interpreted fairly narrowly.
- For example, the number of parcels or landowners in question must generally be in the low single digits in order to meet the requirements of this factor. *See Neuberger v. City of Portland*, 288 Or 155 (1979) (three landowners found to be quasi-judicial), *Patterson v. City of Independence*, 48 Or LUBA 155 (2004) (a single property with one owner found to be quasi-judicial) *but see Davenport v. City of Tigard*, 22 Or LUBA 577 (1992) (nine parcels was found to be legislative); *Valerio*, 33 Or LUBA 604 (185 acres in a number of different ownerships found to be legislative).
- The court also looks at whether the situation involves a closely circumscribed factual situation. If the decision will impact more than just a small number of persons, then the third factor is not met. *See Friends of Cedar Mill v. Washington County*, 28 OR LUBA 477 (1995) (where a 2,400 foot section of a minor arterial would affect more than 40 properties, accommodate 18,000 trips per day and is shown on a regional transportation plan as an arterial of regional significance, the third factor was not met).

19.902.4 - Comprehensive Plan Map Amendments

Changes to the maps of the Milwaukie Comprehensive Plan shall be called Comprehensive Plan map amendments.

A. Review Process

Changes to the maps of the Milwaukie Comprehensive Plan described in Subsection 19.902.2.C shall be evaluated through either a Type IV review, per Section 19.1007, or Type V review, per Section 19.1008. The City Attorney shall have the authority to determine the appropriate review process for each Comprehensive Plan map amendment. The City Attorney's review process determination is not a land use decision per ORS 197.015 and is not subject to appeal.

- Generally, Comprehensive Plan map amendments that involve 5 or more properties or encompass more than 2 acres of land are legislative in nature and subject to Type V review. Comprehensive Plan map amendments that involve fewer properties and encompass a smaller area of land are quasi-judicial in nature and subject to Type IV review.

B. Approval Criteria

- Changes to the maps of the Milwaukie Comprehensive Plan shall be evaluated against the approval criteria in Subsection 19.902.3.B. A quasi-judicial map amendment shall be approved if these criteria are met. A legislative map amendment may be approved if these criteria are met.

19.902.4 Comprehensive Plan Map Amendments, *cont.*

A. Review Process

1. Changes to the Zoning Map described in Subsection 19.902.2.D shall be evaluated through either a Type III review, per Section 19.1006, or Type V review, per Section 19.1008. The City Attorney shall have the authority to determine the appropriate review process for each Zoning Map amendment. The City Attorney's review process determination is not a land use decision per ORS 197.015 and is not subject to appeal.

Generally, Zoning Map amendments that involve 5 or more properties or encompass more than 2 acres of land are legislative in nature and subject to Type V review. Zoning Map amendments that involve fewer properties and encompass a smaller area of land are quasi-judicial in nature and subject to Type III review.

2. Changes that affect both the Zoning Map and text of Titles 14, 17, or 19, or other land use regulations within the Milwaukie Municipal Code shall be evaluated through a Type V review per Section 19.1008. These changes are subject to the approval criteria of Subsections 19.902.5.B and 19.902.6.B.

Bias Determination and Challenge

- If the elected official is accused of bias, a decision must be made whether the elected official should participate in the quasi-judicial decision. The scope of that determination is narrowly limited to the specific decision that is before the Council, who must find that the bias is actual, not merely apparent, and that the elected official has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented. **This creates a high bar to establish bias.**

Impartiality: The Fasano Factors

- State law requires that a decision maker in a quasi-judicial proceeding be impartial. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), and that *ex parte* contacts are just one way to compromise that requirement. *Id.* at 629. We concluded that *Fasano* was not violated where the contacts (1) were with disinterested persons, (2) amounted to an investigation of the merits of the proposed change, and “most importantly,” (3) were made a matter of record so that the applicants had an opportunity to respond. *Id.*

But, No Definitive Case

- What constitutes impartiality and bias, however, is the subject of many Oregon cases. In one of the most recent case is on the issue, the Court of Appeals, in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 602 (2014) held “no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings. . . .” There is no seminal case on point, in part because each case is fact specific.

Certain Factors Emerge

- *First*, the scope of the “matter” and “question at issue” is narrowly limited to the specific decision that is before the tribunal.
- *Second*, because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent.
- *Third*, the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented. *Beck v. City of Tillamook*, 113 Or App 660, 662-63, 833 P2d 1327 (1992).

Bias Means Extreme Bias

- The bar for disqualification is very high. As the court writes in *Columbia Riverkeeper*, “an elected local official’s ‘intense involvement in the affairs of the community’ or ‘political predisposition’ is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.”

Recent Example

- In the *Columbia Riverkeeper* case, a county commissioner, Commissioner Huhtala, had run for office on a platform opposing Liquefied Natural Gas (“LNG”) terminals. Prior to taking office, he wrote an op-ed that said in part:
 - “We’re getting closer to the point when these LNG projects will be shut down. Then we can fully celebrate. In the meantime, let’s take every opportunity to vote for leaders that will properly represent us. And let’s give credit to agencies that do the right thing.”

Establishing a Record Repairing Bias

- “It is clear that I’ve personally expressed many concerns about many aspects of LNG transport. You know, as I mentioned, tanker traffic, dredging issues, safety, the size of the facility in Bradwood, the road conditions—some of the same issues the applicant raised in the Bradwood situation. My reasonable concerns don’t cause me to prejudge the situation. This is a complex application. There is nothing that prevents me from assessing the facts under review. I have the ability to set aside any personal views and to evaluate, discuss and vote on matters of fact. Of course I expressed personal opinions while campaigning. Citizens expect politicians to have opinions, but past association or articulation does not predict future decisions that will be based on the record of facts. I enter this hearing without preconception. I understand my responsibility in a quasi-judicial setting. I take it seriously that I need to remain unbiased during this process and set aside personal views. We all have personal views. One thing that I have been elected to do is sit impartially in a quasi-judicial setting and make decisions based upon the facts.”

What Does it Take to Find Actual Bias?

- "believed he was elected on a mandate to support the proposed siting of the church. . . ." *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137,146 (2002).

Conflicts of Interest

Two Types of Conflict of Interest

In the land use context, the question becomes “could or would?”

1. An elected official or commission member has an actual conflict of interest if his or her action, decision, or recommendation would be to the private pecuniary benefit or detriment of the elected official or the elected official’s relative or any business with which the elected official or his or her relative is associated. ORS 244.020(1).

Conflicts of Interest *cont.*

Two Types of Conflict of Interest

2. An elected official has a potential conflict of interest if any action, decision, or recommendation of the elected official could be to the private pecuniary benefit or detriment of the elected official or his or her relative, or a business with which the elected official or his or her relative is associated. ORS 244.020(12). If granting a variance to a property adjacent to the commission members, there could be an impact.

Exceptions to the Conflict of Interest Rules

- However, there are three exceptions to the definition of potential conflict of interest. ORS 244.020(12). The first exception is for pecuniary benefit or detriment arising out of “any interest or membership in a particular business, industry, occupation, or other class required by law as a prerequisite to the holding by the person of the office or position.”

Exceptions to the Conflict of Interest Rules

CLASS EXCEPTION

- The second exception is for pecuniary benefits or detriments resulting from “any action in the person’s official capacity, which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group, including one of which or in which the person, or the person’s relative or business with which the person or the person’s relative is associated, is a member or is engaged.”

Exceptions to the Conflict of Interest Rules

- Finally, there is no potential conflict of interest for pecuniary benefit or detriment arising out of the person's "membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code."

What Do You Do?

- Councilors or Commission Members who have questions about whether or not they have a conflict of interest should contact the Oregon Governments Ethics Commission, who can assist them in determining whether or not they have a conflict and, if so, how to address it. The OGEC can be reached at 503-378-5105.

Faulty Notice

Potential Goal 1 and 2 Violations

- Function of public notice is to provide parties with sufficient information to prepare for public hearings and address relevant criteria
- ORS 197.763(3) and City Code
 - Nature of the application, proposed uses, hearings procedures, rights of parties
- Is party prejudiced?
 - Omission of applicable criteria
 - Failure to receive notice
- Remedy
 - Have hearing
 - Continue hearing until time/date certain
 - Oral notice is sufficient
 - May also postpone hearing without giving new mailed notice, ex: notice on the door that meeting cancelled

Unclear or Ambiguous Term in Code

- Is interpretation entitled to deference?
 - Planning Commission or hearings officer interpretation is not
 - City Council is entitled to deference
- How to interpret?
 - Advice from City staff
 - Make interpretation clear for record so that Council and parties understand reasoning
 - Statutory interpretation rules
 - LUBA review standard: Board may reverse or remand only if City improperly construed the applicable law

Unclear or Ambiguous Term in Code

- Special rules for residential application
 - Needed housing: ORS 197.307(4)
 - Clear and objective standards
 - Recent LUBA decision: the fact that the City had to interpret its standard meant it was not clear and objective; because City had no valid basis for denying the application, City's decision was prohibited as a matter of law and required reversal

Ex Parte Communication Not Disclosed

- (3) No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
 - (a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and,
 - (b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

Ex Parte Communication Not Disclosed

- The “parties’ right to rebut the substance of the communication” may take the format of a mini-hearing. De novo review by a higher local decision maker may cure a procedural error by providing an opportunity to review the evidence and provide a rebuttal opportunity. So, a Council decision on a hearings officers’ bias or planning commission member’s bias may be necessary to fix an error.

Weighing Professional vs. Lay Testimony

- Substantial evidence standard: whether the evidence in the record would permit a reasonable person to make the disputed finding
- Testimony must address whether approval criterion is satisfied
- Expert testimony
 - May rely on opinions of expert in determining compliance with criteria
 - Not required to accept expert's opinion, even if uncontested, as long as findings explain why the expert report is not viewed as credible or reliable
 - Example: conflicting traffic engineers; resume of expert did not establish credentials

Weighing Professional vs. Lay Testimony

- Safety
 - Expert testimony isn't necessarily presumed to be persuasive, but the decision makers should clearly explain why they found specific testimony persuasive and relied upon it

Rules at the Time of Application

- “Goal post rule” – ORS 227.178(3)(a)
- Only standards and criteria existing on the date the application was submitted govern
- Changing interpretations
 - City generally allowed to reinterpret, but not in same proceeding
 - Cannot change interpretation of whether criteria are applicable
 - Reversal of lower body’s interpretations
- May only amend rules after application is complete

Disruptive Behavior

- What behavior can be limited?
- What are the legal risks associated with preventing speech?

After The Hearing Closes

- Commissioners' questions
 - Factual vs. substantive
 - Reopen record?
 - Re-notice?
- Ex parte communication discovered
 - Announcement at first hearing following the communication
 - Place substance of the communication on the record
 - Right to rebuttal
 - De novo review may cure
 - Council may allow review and rebuttal opportunity
 - When Council relies on findings based on the information from the ex parte contact, defect not cured

Constitutionality Challenges Related to Conditions

- In *Koontz v. St. Johns Water Management District*, 133 S. Ct. 2586 (2013). The Supreme Court expanded the doctrine of unconstitutional conditions in the context of land use. This doctrine, initially was articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* established that when a city imposes on the discretionary grant of a land use permit a condition that would amount to a taking if done outright, two requirements must be satisfied.

Condition Closely Related to Impact

- First, an essential nexus must exist between the condition imposed and the legitimate state interests served by the building restriction from which the landowner seeks a variance. *See Nollan*, 483 U.S. at 837.

Condition is in Scale with Impact

- Second, the nature and extent of the condition must be roughly proportional to the proposed development's expected impact on those state interests. *See Dolan*, 512 U.S. at 391.

Monetary vs. Non-Monetary

- In *Koontz*, the Supreme Court made clear that these requirements apply even when the condition is a payment of money, and even when the exaction never actually occurs because the landowner refuses to agree to the condition and the city therefore denies the permit. *See Koontz*, 133 S. Ct. at 2603.

Testimony by a Planning Commissioner at Council

- Free speech right vs. respect for process
- Importance of findings on the record

Any Questions?



Peter Watts

peter.watts@jordanramis.com

360-567-4843